

R. v. Skeard

Between
Her Majesty the Queen, and
Brent Skeard

[\[2003\] O.J. No. 5853](#)

Ontario Superior Court of Justice
Andre J.

Oral judgment: December 11, 2003.
(33 paras.)

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Trial within a reasonable time — Delay — Prejudice — Remedies for denial of rights — Specific remedies — Stay of proceedings — Criminal law — Offences — Offences against person and reputation — Motor vehicle offences — Impaired driving or driving over the legal limit.

Application by the accused, Skeard, to dismiss charges on the basis of delay. The accused was charged with impaired driving and driving with a blood alcohol level over .08. There was an institutional delay of 10 months. There was no allegation of actual prejudice to the accused. There were no Charter applications and no toxicologist would be called by defence counsel.

HELD: Application allowed. The charges were dismissed. This was a straightforward matter which did not require any additional time or have any additional complexity. The acceptable period of delay was eight to nine months. The delay violated the accused's rights.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 11(b), 24.

Criminal Code, s. 253(b).

Counsel:

A. Esson, counsel for the Crown.

D. Howick, counsel for the accused.

REASONS FOR JUDGMENT

¶ 1 **ANDRE J.** (orally):— This is a matter in which I am being asked to consider whether in institutional delay of exactly ten months is a violation of Section 11(b) of the Canadian Charter of Rights and Freedoms in a matter where there is no allegation of any actual prejudice against Mr. Skeard.

¶ 2 Mr. Skeard was charged on the 18th of September, 2002 in the City of Mississauga, with the offence that he operated a motor vehicle while his ability to do so was impaired by alcohol or a drug and furthermore, that on that date, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, he operated a motor vehicle contrary to Section 253 (b) of the Criminal Code of Canada.

¶ 3 After being charged, Mr. Skeard was released on a promise to appear and he undertook to return to court on the 1st of October of 2002 which he did. He subsequently made court appearances on October 31, 2002, on November 15, 2002, and on December 3, 2002.

¶ 4 By that latter date, the accused retained Mr. David Howick in this matter. Mr. Howick sent the Court a letter dated November 28th indicating, "Please be advised that I have been retained as counsel to Mr. Brent Skeard in the above captioned matter. In that regard will you please adjourn this matter to the 30th of December, 2002 so that I may review the disclosure, the videotaped statement and complete a resolution meeting."

¶ 5 The matter was adjourned to that date. On the 30th of December, 2002 the matter was set for a judicial pre-trial on February 11, 2003. On the latter date, a judicial pre-trial was held and a trial date was set with respect to this matter.

¶ 6 In setting the trial date, Counsel attended at the trial coordinator's office and was able to obtain a date of December 11, 2003, Courtroom 302 at 10:00 for a trial. In obtaining that date, Counsel was required to complete a portion of a document which was endorsed by the trial coordinator in this matter. That document is attached to the information. It indicates that the first suggested date was December 9, 2003. The document indicated that the Crown was not available on that date while the Defence was available.

¶ 7 The second-date indicated on that document is December 11, 2003. Again, the document indicates that both the Crown and the Defence were available on December 11, 2003 for a trial and that is why that date was selected as the trial date.

¶ 8 The document also indicates as, that with respect to this matter, there are no Charter applications; that no toxicologist would be called by the Defence Counsel and that there would be no necessity for a voir dire. So every indication is that this was a straight forward matter which did not require any additional time or did not have any

additional complexity. Indeed, there was every indication that there would be no Charter applications, no toxicologist or a voir dire required in this matter.

¶ 9 Mr. Howick has filed an application alleging that his client's rights under Section 11(b) of the Charter have been violated. Mr. Howick concedes or Mr. Howick indicated to the Court that he is relying entirely on the period between February 11th and December the 11th of 2003 as the time on which he bases his application.

¶ 10 He indicates that for that period, delay is institutional in nature and the delay in this matter at trial is attributed entirely to the lack of court resources in accommodating a trial on an earlier date. The Crown in her submissions, concedes that that period has indeed been caused by institutional difficulties.

¶ 11 Mr. Howick also indicated that he concedes that the period of time, from the 18th of September, 2002 to the 11th of February, 2003, he regards as the intake period or somewhat neutral in that it cannot be attributed to the Crown or to the system.

¶ 12 What then, is the appropriate analysis with respect to the period of institutional delay? Court cases have set out the manner in which these matters are assessed in determining whether or not there has been a violation of Section 11(b).

¶ 13 The four criteria which are applicable in assessing whether there is any violation of 11(b) are as follows, 1), The Court has to assess the length of the time period. 2), Whether there has been any waiver of the time period. 3), The reasons for the time period, for the delay and 4), Prejudice to the accused.

¶ 14 Again, the overall period of time as it relates to this matter is from the 18th of September, 2002 to the 11th of December, 2003, a period of approximately 15 months less one week. The period between the 18th of September, 2002 to February 11, 2003 has been categorized as neutral in nature.

¶ 15 The delay therefore, which has to be assessed in determining whether or not there has been a contravention of Section 11(b); is the ten month period between February 11, 2003 and December 11, 2003. A number of cases have dealt with this problem of delay.

¶ 16 One of the most important cases on that issue is that of Regina v. Sharma, [\[1992\] 1 S.C.R. 814](#), the Supreme Court of Canada which stands for the proposition and I quote, "A delay of eight to ten months for the provincial court is an acceptable guideline to assess whether or not the delay in any particular case is violative of Section 11(b)."

¶ 17 In that case, Sharma, Sopinka J., states and I quote, "The situation in Peel was fully canvassed by this Court in Askov, [\[1990\] 2 S.C.R. 1199](#). While the situation has improved since the Askov decision the district continues to experience institutional delays due to limited resources. Given the fact that Peel has experienced these delays for a longer period of time and, therefore has had more time to address the problem, I would apply the lower range of the guidelines for institutional delay."

"In Morin I stated that this guideline should be in the range of eight to ten months for provincial court subject to deviations by reason of the presence or absence of prejudice. The period from the time the parties were ready for trial in May, 1988 until March 1989 was institutional delay. This is a period of approximately nine months."

¶ 18 The Court in Sharma expressed the view that the appropriate guideline and this is a guideline only, should be eight to ten months in the Ontario Court of Justice or in the Provincial Court as it was known at the time. I should indicate parenthetically, that the Sharma decision was decided in 1992, some 11 years ago.

¶ 19 The Superior Court, in 1992, had occasion to again assess delay within this jurisdiction. The Court was then known as the Ontario Court of Justice, General Division and the Court dealt with an issue of delay as it relates to Section 11(b) in a case called Regina v. Wadas, [\[1992\] O.J. No. 2498](#).

¶ 20 In that matter Justice Belleghem indicated at page six of his judgment; "Although the Crown may justify a delay in excess of the eight month norm for Peel it can only do so if it adduces some evidence that tends to establish that this deviation has resulted in prejudice to the accused. There is no evidentiary burden on the accused to adduce evidence that tends to establish that he has sustained a prejudice from the 11 month delay in the face of an eight month norm."

¶ 21 In that case, the institutional delay was some 11 months. In the case at bar, the institutional delay is ten months but His Honour seems to indicate that the Crown may wish to adduce evidence that the additional period of delay over and above the norm did not result in prejudice to the accused. In this case, there was no attempt by Ms. Esson to do so.

¶ 22 But again, the case of Reaina v. Wadas seems to indicate that the acceptable period of delay in Peel is a period of eight months absent any inherent complexities in any particular case. This case and the Crown has been forthright, there has been no suggestion that this case is any more complex than any other case of impaired operation. Indeed, as I indicated previously the information relayed to the trial coordinator was that this is not a case which would have any Charter application any toxicologist or any voir dire.

¶ 23 Most recently, Justice Hill in the Superior Court of Justice, in a case called Regina v. Meisner, [\[2003\] O.J. No. 1948](#), dealt with the question of delay within this jurisdiction. In that case there was institutional delay of nine months and six days.

¶ 24 In Meisner, Counsel for the defendant did not allege any specific prejudice and in assessing whether or not there was indeed a breach of Section 11(b) of the Charter, Justice Hill had this to say at paragraph 71 of his decision. "The delay from March 12, 2001 to December 18, 2001 is nine months and six days of institutional delay also Within the general guidelines described in Morin.

"Based on the application of the guidelines to this case, a trial in Peel, the institutional delay is right at the margin of what is institutionally acceptable. Prior to trial the application was released on a promise to appear without restricted driving privileges. Mr. Meisner did not seek to demonstrate at trial or on appeal any actual prejudice on account of delay in his case."

¶ 25 Parenthetically, the same applies to this case. Mr. Skeard, through his Counsel, did not seek to demonstrate any actual prejudice on account of the delay to the trial in Peel but again I bear in mind what Justice Belleghem indicated in the case of Regina V. Wadas which is to say that; "There is no evidentiary burden on the accused to adduce evidence to establish that he asserts sustained prejudice from the delay in the face of an eight month norm."

¶ 26 In any event, Justice Hill continued at paragraph 73; "While some general or inferred prejudice to Mr. Meisner may be assumed from the delay to trial the Defence adduced no evidence of specific prejudice in the circumstances of this case. In this regard, I repeat my observation in Wing v. Gordon et al, [\[1998\] O.J. No. 4838](#) at paragraph 279, a deviation of several months in either direction from the delay reasonably expected in the circumstances of a particular case can be justified by the presence or absence of prejudice."

¶ 27 Paragraph 74 indicates, "Given that the government has had well over a decade of experience in dealing with trial delay in Peel, the amount of constitutionally tolerable institutional delay for a trial in the Ontario Court of Justice should be about eight months with such delay generally not exceeding about nine months. The presence of specific prejudice referable to delay beyond this range which of course is not a defendant's responsibility justifies a stay of proceedings for violation of Section 11(b) of the Charter."

¶ 28 Bearing in mind these decisions by the Superior Court of Justice and the Ontario Court of Appeal, I am left to ask myself whether a delay of ten months in this particular case is violative of Section 11(b) of the Canadian Charter of Rights and Freedoms.

¶ 29 Again, it is conceded or there has been no attempt to argue any actual prejudice but again, there seems to be some authority for the proposition that a Defence does not have - the Defence has no obligation to do so. The Court has to assess the question of delay on the facts of the particular case and secondly, on the established case law on that issue within the particular jurisdiction.

¶ 30 Again, I note parenthetically, that the Askov decision was made in 1990 while the Sharma decision was in 1992. The decisions of Justice Belleghem in Regina v. Wadas in 1992 and Justice Hill in Meisner in 2003 have a central theme; that the delay, the question of delay within this jurisdiction has been extractable. It has been persistent. It has been chronic and there has not, other than the periodic hiring of crown attorneys and

judges, there has not been any indication or semblance of any amelioration of the problem of delay within this jurisdiction.

¶ 31 Again both decisions, that is to say Regina v. Wadas and Regina v. Meisner seem to emphasize that the authorities have had a fairly significant period of time to deal with the problem of delay and yet it appears, that today, setting a simple trial for charges of impaired driving, and over 80 with no constitutional arguments or no toxicologist involved, resulted in an institutional delay of ten months.

¶ 32 Justice Hill in Meisner indicated that the delay of nine months and six days of institutional delay was, to quote Justice Hill, "Right at the margin of what is constitutionally acceptable." In this case, the amount of delay is some ten months which is to say three weeks, a little over three weeks in excess of the time period which Justice Hill had to deal with in the case of Regina v. Meisner.

¶ 33 Based on that decision, and even without any specific evidence as to actual prejudice, in my opinion, there has been a violation of Section 11(b) and to that extent under Section 24 of the Charter, it is my opinion that the charges against Mr. Brent Skeard should be stayed as a result of a violation of Section 11(b) of the Charter.

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